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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

JACOB GARDNER AND PETER GARDNER,
PLAINTIFFS IN ERROR,

v.

L. H. BONESTELL, EXECUTOR OF THE ESTATE OF EBENEZER WORMOUTH, DECEASED.

No. 143.

PETITION FOR REHEARING.

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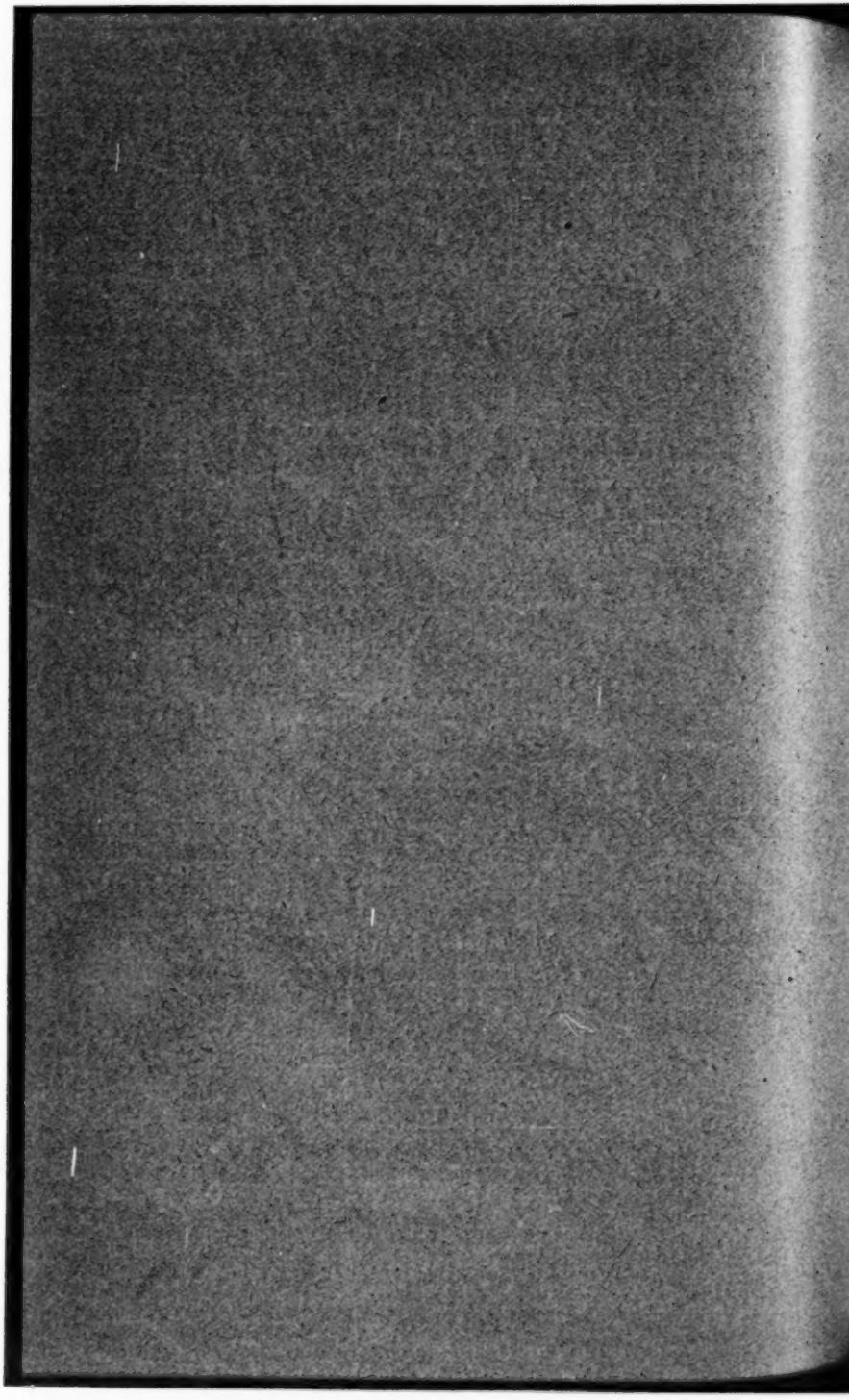

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Plaintiffs in error deraign title through mesne conveyances from one Juan Read, grantee of the Mexican Government, on October 2, 1834, of the Rancho Corte de Madera del Presidio, and continuous possession or assertion of right thereto during the more than half century which has since elapsed. In all judicial proceedings hitherto affecting this land, wherein such derivative owners have affirmatively asserted title and right of possession against intruders thereon, they have uniformly prevailed. In present case they are parties defendant; the attack was made upon their title, and their defence has been overruled.

While the opinion of this honorable Court correctly holds as settled principles of law (*a*) that findings of fact by the Land Department in cases falling within its jurisdiction are, in the absence of fraud or mistake, controlling upon the judiciary, and (*b*) that the original power to make and correct surveys rests exclusively with the Land Department, it is yet most respectfully submitted that in the case at bar just and controlling exception to the application of these general principles clearly exists.

I.

The opinion correctly concedes that "the grant was one "not of quantity, but by metes and bounds." * * *

Section 7, Act of July 1, 1864 (13 Stats., p. 332), whereunder the grant was finally surveyed, expressly provides:

"That it shall be the duty of the Surveyor General of "California, in making surveys of the private land claims "finally confirmed, *to follow the decree of confirmation* "*as closely as practicable, whenever such decree designates* "*the specific boundaries of the claim.*"

The decree confirming this grant recites the initial boundary call thus:

"Commencing from the solar which faces west at a "point at the slope and foot of the hills which lie in that "direction and on the edge of the forest of redwoods "called Corte de Madera del Presidio, and running from "thence in a northwardly direction four thousand five "hundred varas to an arroyo called Holon where is "another forest of redwoods called Corte de Madera de "San Pablo."

Instead of *following* the decree and marking the boun-

daries in accordance with its initial and consecutive calls, the patent survey ignores this binding statutory requirement and duty by proceeding in the opposite direction. From the initial point named in the decree (the "solar," or house lot), the call therein is

"thence in a *northwardly* direction four thousand five "hundred varas, to an arroyo called 'Holon,'" etc.;

Whereas the patent survey (Rec. 119) begins at a described post standing "on the place formerly known as "the Solar, 'which faces west,'" and by prescribed course, thence proceeding "*south* 2 *chains* 45 *links to the* "*center of the Arroyo Corte Madera del Presidio*, being "the northerly boundary of the Rancho 'Sausalito' Sta- "tion; thence following the center of said arroyo through "a dense thicket of willows formerly known as the "'Sausal,' south 33 degrees 45 minutes east, 5 chains 85 "links to Station," and continuing southerly to the marsh or bay.

And the last two calls of the patent survey purport to cover the *initial* call of the decree by extending the line *south* instead of *north*, as shown in the extract from the field notes at page 119 of the Record.

It thus clearly appears from the record that the surveyor plainly violated and ignored the law in failing to thus "follow the decree of confirmation as closely as practicable, "whenever such decree designates the specific boundaries "of the claim," and likewise ignored the decree in thus unlawfully seeking to establish the boundaries called for therein by running his lines in a constant direction, directly *opposite* to the boundary calls as given in the decree. The result was and is that the patent survey and subsequent patent erroneously included lands not within

the calls of the decree, and through like error of law excluded the land here in controversy, which plaintiffs in error contend was and is embraced within such boundary calls of the decree. These dual errors of inclusion and exclusion are demonstrated by examination of the original diseno (Rec. 46, A). This diseno is made part of the decree of confirmation and is "the map" spoken of at the end of the decree to which, with the record of juridical possession, "reference is to be had." By this diseno is disclosed the true course and location of the westerly boundary of the grant as thus confirmed, and as extending northwardly and on a line with the church building marked "Mission de San Rafael;" thence turning to the eastward and reaching the waters of the Bay of San Francisco, on almost a due east and west course, excluding the possibility of inclusion within the confirmed grant of the waters of "Corte de Madera Slough," which water course is located on the diseno, to the north of the northern boundary, as fixed thereon.

This description in the diseno is in exact accord with the second call of the decree, which is "thence by the "waters of the said arroyo to the Bay of San Francisco, "10,000 varas to the Point Taburon," etc.

Comparing the patent survey (Rec. 1) with this diseno, will disclose at once that the former wholly ignores the western boundary line of the ranch as clearly delineated on the diseno, and as clearly described in the record of juridical possession (Rec. 86), and in full harmony with the call of the diseno in the decree of confirmation. *The decree and the diseno clearly embrace the land here in dispute.* It is excluded only by the patent survey made in flat contradiction (1) of the statute and (2) of the plain boundary calls of the decree, AND HERE ARISES THE ONLY BUT CONTROLLING CONFLICT BETWEEN THE DECREE AND THE SURVEY WHICH AFFECTS THE PLAINTIFFS IN ERROR.

Manifestly the decree of confirmation herein establishes both title and absolute controlling boundaries. It can not be challenged either as to title or boundaries, nor the rights of the grantees and derivative owners thereunder destroyed by an official survey which, upon the face of the record, is so clearly erroneous. While the Land Department was vested with power to survey these private claims, its duty was defined and limited to *following* the decree of confirmation. (*Van Reynegan* v. *Bolton*, 95 U. S. 33). When, as here, it radically departs therefrom, it is impossible to say that the rights of the grantees to property whereof they have had possession since the original grant from the Mexican Government in 1834, are hence destroyed, or that the decree of confirmation and its controlling boundaries may not be successfully invoked by them in defense of a suit initiated by one claiming under adverse claim of title. Otherwise the judicial decree which establishes both title and boundaries, would be subordinated, in legal effect, to the act of an administrative officer in assuming to establish such confirmed boundaries, and such administrative action, if held controlling, would amount to divestiture of title established by such prior decree.

It may well be that in grants of quantity within larger boundaries or of place, without designated boundaries, controlling discretion is vested in the Land Department to finally locate same by survey and patent. But where the decree of confirmation, as in present case, itself determines boundaries by express recital, it is submitted such judicial decree cannot at any time or place be held subordinate to the subsequent action of an administrative officer, in attempting to survey and patent the boundaries as thus defined and confirmed. Otherwise the confirmed grant could be located by the decree upon one part of the

earth's surface, and by the survey and patent upon a totally different part, and the grantee left without defence against subsequent intruders upon the tract as really confirmed and possessed by him. We do not understand that such conclusive or controlling effect can be thus given the survey and patent of confirmed private land claims in California. While the Act of 1864 above noted cast upon the Land Department the primary duty of surveying confirmed private land claims in California, and (as of course) of determining the locus of boundary calls, patent errors in performance of such duty certainly are not and cannot be beyond judicial remedy. In *Van Reynegan v. Bolton* and involving this same grant, this Court said:

"That is a question which must, *in the first instance*, be "determined by the Land Department in carrying the "decree into execution by a survey and patent."

Thus clearly implying that error of the Land Department therein is not beyond judicial review.

II.

Plaintiffs in error urged that the locus of the boundary calls as given by the decree of confirmation were established in this case by uncontradicted testimony. The opinion declares that such position "ignores the survey, "which is in itself evidence and that of a most persuasive "kind," which even in a proper case "can be overthrown "only upon satisfactory evidence of mistake."

But the point as urged by plaintiffs in error was and is that the survey as shown by this record and comparison thereof with the decree of confirmation and the express command of the statute that the survey must *fol-*

law the decree, demonstrates its utter invalidity both in law and fact; that in such case and upon so plain a record, and in all justice, a survey so manifestly invalid ought not to be permitted to be set up against them as conclusive nor deprive them, in defending their right to this property, of relying upon the decree of confirmation as the source and the controlling and conclusive basis of their title. In short, accepting the general doctrine as to the finality of a survey, it can and should apply only where the survey has been made in accord with the law and with the controlling decree of confirmation which it purports to execute; whereas, where, as here, both the decree and law are so plainly violated, the *decree* must control for their protection as against such an erroneous and invalid survey.

III.

The opinion declares that the undersigned have mistaken their remedy, which was "by application to the "Land Department to correct the survey, and failing to "secure correction there, a direct proceeding in the "courts in which the Reed heirs should have been par-"ties, and in which they could have been heard to defend "the survey and patent."

But with great respect it is submitted—

First. Application to the Land Department to correct the survey involved refusal to accept the survey as made and the patent as issued thereon. *Leroy* v. *Jamison*, 3 Saw. 369, 392. That was wholly within the control of the Reed heirs and not of these plaintiffs in error or their immediate grantor, who was the record owner of the land here involved when such survey was made and patent issued. The Reed heirs then owned no land of the grant outside the survey and patent.

Second. The plaintiffs in error here did not initiate this litigation. They were sued and were and are the parties defendant, and when attacked were compelled to defend.

Third. No direct proceedings in the Courts to reform the survey and patent was open to these plaintiffs in error within their understanding of judicial procedure. No decree therein could bind the United States nor operate by estoppel or otherwise upon the Government or its grantees. Hence and where, as here, their adversary presents the Government's patent they feel keenly the utter want of judicial remedy open to them at any time heretofore in any suit to reform the survey which would bind the Government or its grantees, and notwithstanding the suggestion of the opinion as to any such open remedy for relief they ask this Honorable Court, in all fairness *what* proceeding, judicial or executive, could have been available to them in the affirmative protection of their property rights? Clearly none. They could only defend when attacked, and to be told on such defence that they are concluded through failure to pursue a remedy never open to them, and at the same time held concluded by a record which they could not challenge or elsewhere seek to correct or reform, is, they finally submit, practically taking their property without due process of law, by denying in *this* case their right to raise and determine essential issues because concluded by some other proceeding whereto they were not parties, and to correct which no remedy, judicial or otherwise, is or has been open to them.

Hence it is that with the present judgment of this Honorable Court taking from them property held by them and their predecessors in interest for over half a century, they earnestly and most humbly beg rehearing of their cause by this Honorable Court.

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We most respectfully submit that we know of no rule of law which metes out equal justice to the Government and its citizens other than to obey the mandate of the final decree of confirmation. Therefore, we believe the case should be sent back and tried upon that basis. No finding of the trial court appears showing this land is *not* within the boundaries declared by the final *decree*, and since the decree is conclusive as investing title, possession thereunder for nearly sixty years should give us the right to have fully heard and determined the important and vital question whether *this* land is within the boundaries named in such decree, as by this record so plainly appears. This is the vital point in the case—the plain conflict between the decree and the survey. The decree plainly says this land *is* confirmed to us; the survey alone declares that it is not. The Land Department alone has thus created this conflict, and this record plainly shows it. It is *not* a matter of conflicting oral testimony whereon findings of fact may be made by the Court, but is matter of record not controlled or affected by such findings and whereon we should not be held responsible nor be concluded by such wrongful and erroneous action of the Land Department. It is hence a question of law only, viz., plain conflict between the *decree* which controls and the *survey* which should not.

Respectfully submitted.

JACOB GARDNER AND
PETER GARDNER,
Plaintiffs in Error.

The purpose of foregoing petition is to distinctly raise for consideration the question of predominance between the decree of confirmation and the survey, which is upon its face antagonistic to the decree. This conflict prevents a fair trial between the parties, if, as we believe, the foregoing petition presents a meritorious question of law.

A. B. BROWNE,
ALEX. BRITTON,
Attys. for Plffs. in Error.